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17 *Attorneys for Plaintiff Alan Preis*

18 **UNITED STATES DISTRICT COURT**  
19 **NORTHERN DISTRICT OF CALIFORNIA**

20 IN RE DYNAMIC RANDOM ACCESS  
21 MEMORY (DRAM) ANTITRUST  
22 LITIGATION

Master File No. M-02-1486PJH  
MDL No. 1486

23 **DECLARATION OF ANTHONY D.**  
24 **SHAPIRO IN SUPPORT OF MOTION FOR**  
25 **AN AWARD OF ATTORNEYS' FEES AND**  
26 **REIMBURSEMENT OF EXPENSES**

27 This Document Relates to:

*Preis v. Hitachi, Ltd., et al.,*  
Case No. CV 10-0346 PHJ

28 Date: October 27, 2010  
Time: 9:00 a.m.  
Judge: Hon. Phyllis J. Hamilton  
Ctrm: 3, 3<sup>rd</sup> Floor

1 I, Anthony D. Shapiro, declare and state as follows:

2 1. I am a partner at the law firm of Hagens Berman Sobol Shapiro LLP, co-lead  
3 counsel in the above captioned case. I submit this declaration in support of the Motion for an  
4 Award of Attorneys' Fees and Reimbursement of Expenses. The matters stated herein are true to  
5 the best of my personal knowledge and, if called upon to testify thereto, I would competently do so.

6 2. The purpose of this declaration is to summarize the factual and procedural history of  
7 this litigation, including, but not limited to, the facts surrounding this action, the tolling agreements  
8 entered into with defendants ("Defendants")<sup>1</sup> regarding this action, the investigation of this action,  
9 discovery, settlement negotiations, notice, and litigation expenses, as well as connected facts from  
10 the earlier DRAM litigation, *In Re Dynamic Random Access Memory (DRAM)*, Master File No.  
11 M:02-cv-01486-PJH (the "Related Action"). As co-lead counsel ("Class Counsel") for Plaintiff  
12 Alan Preis ("Plaintiff") and the direct purchaser class ("the Class"), my firm has been intimately  
13 involved in all aspects of this litigation from the outset to the present.

#### 14 I. INTRODUCTION

15 3. This case involves allegations of an over-arching horizontal price-fixing conspiracy  
16 in the market for Dynamic Random Access Memory ("DRAM") between Defendants and their Co-  
17 Conspirators<sup>2</sup> during the period April 1, 1999, through June 30, 2002 (the "Class Period").

18 4. There was an earlier phase of this litigation (the Related Action), in which direct  
19 purchaser plaintiffs alleged the same conspiracy as alleged by Plaintiff here, but against different  
20 defendants. All claims against defendants in the Related Action have been resolved. The attorneys

21 \_\_\_\_\_  
22 <sup>1</sup> Unless otherwise noted herein, "Defendants" include: (1) Mitsubishi Electric Corporation and  
23 Mitsubishi Electric and Electronics USA, Inc. (collectively, "Mitsubishi"); Hitachi, Ltd.  
("Hitachi"); and (3) Toshiba America Electronic Components, Inc. and Toshiba Corporation  
(collectively "Toshiba")

24 <sup>2</sup> "Co-Conspirators" were defendants in the Related Action, including: Elpida Memory, Inc.,  
25 Elpida Memory (USA), Inc.; Hynix Semiconductor, Inc. and Hynix Semiconductor America, Inc.  
26 (collectively "Hynix"); Infineon Technologies AG and Infineon Technologies North America  
27 Corporation; Micron Technology, Inc. and Micron Semiconductor Products, Inc. and Crucial  
28 Technology Inc. (collectively "Micron"); Mosel Vitelic Corporation and Mosel Vitelic Corporation  
(USA); Nanya Technology Corporation ("Nanya Taiwan") and Nanya Technology Corporation  
America ("Nanya USA") (collectively "Nanya"); NEC Electronics America, Inc.; Samsung  
Semiconductor, Inc. and Samsung Electronics Co., Ltd.; and Winbond Electronics Corporation and  
Winbond Electronics Corporation America.

1 serving as Class Counsel in this action are same as those that served as Class Counsel in the  
2 Related Action.

3 5. The Related Action came on the heels of an investigation by the Department of  
4 Justice (“DOJ”) into price-fixing in the DRAM industry. The DOJ issued indictments against  
5 several of the defendants in the Related Action and ultimately a number of them (and a number of  
6 their employees) pled guilty to conspiring to fix prices of DRAM with respect to six original  
7 equipment manufacturers (“OEMs”) in violation of the Sherman Act. While the DOJ included  
8 Hitachi, Mitsubishi, and Toshiba in its investigation, none were indicted. As a result, Defendants  
9 were not named as defendants in the Related Action. To be prudent, however, Class Counsel  
10 negotiated separate agreements with Hitachi, Mitsubishi, and Toshiba to toll the statute of  
11 limitations on potential claims until the Related Action was concluded (the “tolling agreements”).

12 6. After the Related Action was concluded in 2007, and pursuant to the tolling  
13 agreements, Class Counsel conducted a thorough investigation as to whether Hitachi, Mitsubishi  
14 and Toshiba participated in the DRAM conspiracy. Plaintiff subsequently brought this action  
15 against Defendants. From the beginning of this case in 2007 until December 2009, when the last  
16 Defendant settled, Class Counsel vigorously prosecuted this action on behalf of Plaintiff and the  
17 Class.

18 7. Class Counsel achieved settlements with Defendants totaling \$37,222,200 (the  
19 “Settlement(s)”).<sup>3</sup> For their efforts in achieving this exceptional result, Class Counsel are seeking  
20 an award of attorneys’ fees in the amount of 25% of the settlement monies (the “Settlement Fund”)  
21 plus interest,<sup>4</sup> and reimbursement of their out-of-pocket litigation expenses in the amount of  
22 \$20,382.97. *See* Notice of Motion, Motion, and Memorandum of Points and Authorities in  
23 Support of Motion for an Award of Attorneys’ Fees and Reimbursement of Expenses, filed  
24 herewith.

25  
26 <sup>3</sup> All settlement payments made to date have been placed in an interest-bearing escrow account.

27 <sup>4</sup> As of August 31, 2010, the amount in the Settlement Fund (Settlement plus interest) was  
28 \$28,645,288.67. Pursuant to its settlement agreement, on October 14, 2010, Mitsubishi will  
contribute an additional \$9,372,200 to the Settlement Fund.

1           8.       The Settlements were achieved in the face of a strong defense, fueled by Defendants  
2 and their counsels' extensive resources and experience, and following intense and prolonged  
3 settlement negotiations. By any measure, the result here is outstanding, but particularly  
4 considering the task of litigating such a large, complicated case and the enormous risk of non-  
5 payment involved in undertaking this litigation.

## 6                                   **II.       FACTUAL AND PROCEDURAL BACKGROUND**

### 7       **A.       Overview**

8           9.       In 2007, after the Related Action was concluded and pursuant to the tolling  
9 agreements, Class Counsel turned their attention to Defendants and began an investigation to  
10 determine whether Defendants participated in the DRAM conspiracy. As set forth more fully  
11 below at ¶¶ 16-20, over many months, Class Counsel engaged in negotiations with defense counsel  
12 to obtain informal discovery from Defendants. Discovery was obtained from Hitachi and  
13 Mitsubishi and Class Counsel spent many months reviewing tens of thousands of pages of  
14 documents produced by those entities. Class Counsel also spent months searching the database  
15 from the Related Action and reviewing the results of those searches for evidence of Hitachi,  
16 Mitsubishi, and Toshiba's participation in the conspiracy.

17           10.       Between 2007 and 2009, Class Counsel engaged in protracted settlement  
18 negotiations with defense counsel, until the parties finally reached settlement as to the last  
19 Defendant, Toshiba, in December 2009.

20           11.       On January 25, 2010, Plaintiff filed a complaint (the "Complaint" and cited as  
21 "Compl.") on behalf of himself and the Class. The Complaint alleges an over-arching horizontal  
22 conspiracy among Defendants and their Co-Conspirators to fix prices for DRAM and to allocate  
23 markets and customers for the sale of DRAM in the United States from April 1, 1999, through June  
24 30, 2002. Compl., ¶ 2. The Complaint alleges that Plaintiff and members of the Class are direct  
25 purchasers of DRAM from Defendants and/or their subsidiaries and were injured because they paid  
26 more for DRAM than they would have absent Defendants' illegal conspiracy. Compl. ¶¶ 2, 60, 68-  
27 72, 78. Plaintiff sought, among other things, treble damages pursuant to Sections 4 of the Clayton  
28 Act, 15 U.S.C. §§ 15 and 22. Compl., Prayer for Relief, ¶¶ C, D.

1           12.     On April 1, 2010, Plaintiff submitted papers to the Court requesting class  
2 certification for a settlement class and preliminary approval of the Settlements. *See* Direct  
3 Purchaser Plaintiff’s Notice of Motion and Motion for Certification of a Settlement Class and  
4 Preliminary Approval of Class Action Settlements with Mitsubishi, Hitachi, and Toshiba;  
5 Memorandum in Support Thereof (Dkt.#2031).

6           13.     On May 12, 2010, the Court granted Plaintiff’s motion for certification of the  
7 settlement class and preliminary approval of the Settlements. *See* Order Granting Class  
8 Certification of Class Certification and Preliminary Approval of Class Action Settlements with  
9 Mitsubishi, Hitachi, and Toshiba. (Dkt.# 2041.) Pursuant to the Court’s Order, proper Notice was  
10 provided to over a million Class Members before June 23, 2010, by direct mail or email, and Class  
11 Members were given the opportunity to opt-out of the Class or file objections by August 16, 2010.<sup>5</sup>

12           14.     A hearing on final approval of the Settlements and Class Counsel’s request for  
13 attorneys’ fees and reimbursement of expenses is scheduled for October 27, 2010.

### 14                   **III.     THE WORK PERFORMED AND RESULTS ACHIEVED**

#### 15           **A.     Tolling Agreements**

16           15.     Unlike their Co-Conspirators (defendants in the Related Action), Defendants here  
17 were not indicted by the DOJ. In fact, the DOJ gave Hitachi a “non-prosecution” letter to confirm  
18 that it would not be indicted or face any criminal charges.<sup>6</sup> Accordingly, Defendants were not  
19 named in the Related Action. However, to be prudent, Class Counsel negotiated separate  
20 agreements with each Defendant to toll the statute of limitations with regard to any claims arising

21 \_\_\_\_\_  
22 <sup>5</sup> On August 18, 2010, the Ninth Circuit issued its opinion in *In Re Mercury Interactive Corp. Secs.*  
23 *Litig.*, 2010 U.S. App. LEXIS 17189 (9th Cir. Aug. 18, 2010), holding that district courts should  
24 set the deadline for objections to a counsel’s fee request on a date *after* the motion and documents  
25 supporting it have been filed. *Id.* at \*13-15. Because the deadline for objectors in this case  
26 (August 16, 2010) had already passed when the *Mercury* decision was filed and the fee application  
due date had already been set for September 21, 2010, Class Counsel raised this issue with the  
Court by letter dated August 26, 2010. In response, the Court issued a minute order on August 31,  
2010, advising Class Counsel to post the full fee application on the case website on September 21,  
2010, providing over 30 days notice of the full petition before the October 27, 2010 date for final  
hearing. *See* Minute Order (Dkt.#28).

27 <sup>6</sup> The lack of charges by the DOJ created a significant hurdle for Class Counsel in negotiating  
28 settlement and would have posed a serious risk to the success of Plaintiff’s case had this action  
gone forward.

1 from the Related Action. After many months of negotiation with defense counsel, Class Counsel  
2 drafted the tolling agreements and all were finally executed by June 15, 2006.

3 **B. Investigation and Development of Facts**

4 16. After the Related Action concluded, Class Counsel began investigating what claims,  
5 if any, could be brought against the Defendants. Over many months, Class Counsel sought and  
6 obtained informal discovery from Defendants Hitachi and Mitsubishi. As a result, Defendants  
7 Hitachi and Mitsubishi produced tens of thousands of pages of documents, which Class Counsel  
8 organized, reviewed, and analyzed to formulate Plaintiff's claims against Defendants.

9 17. In addition, because Plaintiff was alleging a conspiracy amongst all DRAM  
10 manufacturers, Class Counsel necessarily had to conduct a review of the over 4.5 million pages of  
11 documents produced in the Related Action (for evidence of the overall conspiracy and for evidence  
12 of each Defendant's participation in the overall conspiracy). Class Counsel performed a series of  
13 searches in the document database for the Related Action. These searches yielded many  
14 documents that Class Counsel then reviewed and analyzed. Furthermore, Class Counsel reviewed  
15 many of the deposition transcripts from the Related Action to formulate their case against  
16 Defendants and to determine the extent of each Defendant's involvement in the conspiracy.

17 18. Class Counsel also reviewed and analyzed the deposition transcripts from the  
18 related opt-out and indirect DRAM actions and criminal transcripts from the Gary Swanson  
19 (Hynix) trial for evidence of Hitachi, Mitsubishi, and Toshiba's participation in the conspiracy.

20 19. Class Counsel also worked to secure waivers from defendants in the Related Action  
21 to allow Class Counsel to share documents with Toshiba, Hitachi, and Mitsubishi. This process  
22 involved a significant number of phone calls and written correspondence with defense counsel.

23 20. To organize and determine the value of certain documents, Class Counsel had to go  
24 back to materials in the Related Action to see how Defendants' actions fit into the overall DRAM  
25 conspiracy. For example, each document needed to be compared to the overall chronology of  
26 events prepared in the Related Action to see if Defendants participated in meetings or in other  
27 conspiratorial communications with Co-Conspirators.

28

1 **C. The Complaint**

2 21. While the Complaint was officially filed after the settlements occurred, on January  
3 25, 2010, in connection with Plaintiff's papers for preliminary approval, Class Counsel had no  
4 assurance of settlement and spent many months researching and drafting the allegations that would  
5 later go into the filed version. This was a tedious process that required a detailed look at the  
6 evidence from the Related Action as well as new evidence uncovered through detailed review and  
7 analysis of documents produced by Hitachi and Mitsubishi.

8 **D. Settlement Negotiations and Settlement Results**

9 22. From 2007 through December 2009, Class Counsel participated in extensive and  
10 lengthy settlement negotiations with counsel for Defendants. Negotiations with each Defendant  
11 occurred over a span of many months and involved telephone conferences, email and written  
12 correspondence, and face-to-face meetings. In preparation for settlement negotiations, Class  
13 Counsel prepared detailed analyses of the evidence for each Defendant, damages computations as  
14 to each Defendant, and assessed each Defendant's potential exposure. Settlement negotiations with  
15 all Defendants were difficult and protracted.

16 23. Guido Saveri, of Saveri & Saveri, and I participated in all of the individual  
17 settlement negotiations with each of the three Defendants. The settlement negotiations continued  
18 over a long period of time and were protracted due to the fact that none of the three Defendants had  
19 been indicted by the DOJ and because they claimed there was no evidence of their participation in  
20 the conspiracy. They also referred to the DOJ's result in the criminal trial against an executive of  
21 defendant Hynix, Gary Swanson, in the Related Action, where conspiracy charges resulted in a  
22 hung jury and ultimate dismissal by the DOJ.

23 24. In the end, Plaintiff entered into settlement agreements with all three Defendants.  
24 The Settlements were achieved after extensive arms-length negotiations and represent outstanding  
25 recoveries for the Class. Each Settlement provides for a release of Class Members' claims in  
26 exchange for a substantial cash payment. Further detail on each settlement is provided below:  
27  
28

1           **1.     The Hitachi Settlement**

2           25.     The settlement negotiations with Hitachi began on or about May 30, 2007. At that  
3 time, we were informed that Hitachi had obtained a non-prosecution agreement from the DOJ. The  
4 negotiations were thorough and hard fought. They were conducted at arms-length in the utmost  
5 good faith. Prior to several of the settlement negotiations, Class Counsel would share with defense  
6 counsel some of the inculpatory emails and deposition testimony. At the end of this long process,  
7 the parties reached a settlement. Class Counsel and Hitachi's counsel negotiated for more than a  
8 year and the final settlement agreement was executed on June 27, 2008.

9           26.     Hitachi has agreed to pay \$11,500,000 to the Class in return for a dismissal with  
10 prejudice and release of itself and, *inter alia*, all of its respective past and present, direct and  
11 indirect, parents, subsidiaries, and affiliates. Hitachi Settlement, ¶¶ 6, 16. The Hitachi Settlement  
12 also authorizes the use of \$500,000 of the settlement fund for notice and administrative costs.  
13 Hitachi Settlement ¶ 19. Hitachi agreed to pay \$5,750,000 fifteen (15) business days from the date  
14 the motion for preliminary approval was filed and the remaining \$5,750,000 fifteen (15) business  
15 days from the date preliminary approval was granted. Hitachi Settlement ¶ 16. As part of the  
16 settlement agreement with Hitachi, Class Counsel negotiated that Hitachi would provide Class  
17 Counsel with a full list of those class members with which it had reached individual settlement  
18 agreements (*i.e.*, a list of exclusions) and that Class Counsel would have the right to audit that list.  
19 Hitachi Settlement ¶ 16. The Hitachi Settlement amounts to approximately 9% of the sales  
20 remaining in the Class during the Class Period.

21           **2.     The Mitsubishi Settlement**

22           27.     Settlement negotiations began as early as November 2007 and were thorough and  
23 hard-fought. The negotiations spanned a long period of time and were conducted at arms-length  
24 and the utmost good faith. The parties ultimately reached a settlement in October 2008, and a  
25 settlement agreement was executed on October 31, 2008.

26           28.     In exchange for dismissal with prejudice and a release of all claims asserted in the  
27 Complaint, Mitsubishi has agreed to pay \$7,100,000 plus (1) a maximum of \$400,000 for notice  
28 and administration costs, and (2) five percent of Mitsubishi's DRAM sales during the Class Period

1 in excess of \$142,000,000 to Class Members who remain in the Class following the deadline to opt  
 2 out and who have not otherwise settled with Mitsubishi. Mitsubishi Settlement ¶¶ 6, 16, 19.  
 3 Mitsubishi agreed to pay \$7,500,000 thirty five (35) business days from the date the motion for  
 4 preliminary approval was filed. Mitsubishi Settlement ¶ 16. As part of the settlement agreement  
 5 with Mitsubishi, Class Counsel negotiated that Mitsubishi would provide Class Counsel with a full  
 6 list of those class members with which it had reached individual settlement agreements (*i.e.*, a list  
 7 of exclusions) and that Class Counsel would have the right to audit that list. Mitsubishi Settlement  
 8 ¶ 18.

9 29. As referenced in ¶ 28 above, Mitsubishi agreed to pay an additional 5% for its sales  
 10 to Class Members in excess of \$142,000,000 who did not opt out. To determine how much  
 11 Mitsubishi owed in additional settlement monies, Class Counsel reviewed the opt-out list and had  
 12 discussions with counsel for Mitsubishi. Class Counsel determined that there was \$187,444,040 of  
 13 sales to Class Members that did not opt out which exceeded \$142,000,000. The following chart  
 14 breaks down this analysis:

	Amount of Sales	Settlement payment amount:
Floor amount negotiated in settlement agreement with Mitsubishi (excluding \$400,000 negotiated for notice and administration)	\$142,000,000	\$7,100,000
Amount of sales that exceeded floor amount of \$142,000,000 and for which Mitsubishi agreed to pay an additional 5% in settlement monies	\$187,444,040	\$9,372,200  (payment due by October 14, 2010)
Mitsubishi's total sales to Class Members that did not opt-out	\$329,444,040	

25  
 26 30. On September 7, 2010, I spoke with counsel for Mitsubishi, Terrance Traux. Mr.  
 27 Traux informed me that, subject to client approval, Mitsubishi acknowledged its obligation to pay  
 28

1 additional settlement monies it owes (\$9,372,200, *i.e.*, 5% of \$187,444,040) to the Settlement Fund  
2 by October 14, 2010. Mr. Traux confirmed this to me further by email on September 17, 2010.

### 3 **3. The Toshiba Settlement**

4 31. Settlement negotiations commenced as early as May 2007. As was the case with the  
5 other Defendants, the negotiations were thorough and hard fought. They were conducted at arms  
6 length and in the utmost good faith. The negotiations covered a substantial period of time. In late  
7 2009, it appeared as if a settlement with Toshiba was not going to be reached. In accordance with  
8 the provisions of the tolling agreement with Toshiba, Class Counsel provided Toshiba with notice  
9 that it was terminating the tolling agreement and would be filing a complaint within days. Class  
10 Counsel prepared a thorough and detailed *Twombly*-proof complaint. Soon thereafter a settlement  
11 agreement in principle was reached. A settlement agreement was executed on December 15, 2009.

12 32. Toshiba agreed to pay \$9,250,000 to the Class in return for a dismissal with  
13 prejudice and release of itself and, *inter alia*, all of its respective past and present, direct and  
14 indirect, parents, subsidiaries, and affiliates. Toshiba Settlement ¶¶ 6, 16. In addition, Toshiba  
15 agreed to pay a maximum of \$400,000 to be used for notice and administration costs. Toshiba  
16 Settlement ¶ 6. Toshiba agreed to pay \$9,650,000 thirty (30) business days from the date a motion  
17 for preliminary approval was filed. Toshiba Settlement ¶¶ 16, 18. The Toshiba Settlement  
18 represents approximately 5% of sales to direct purchasers which remained in the Class during the  
19 Class Period.

20 33. The Settlement Fund represents a recovery of in excess of 40% of the Class' single  
21 damages, once opt-outs and their sales are excluded. The settlements resulted in Defendants  
22 paying between 5% and 9% of their sales during the Class Period. This compares very favorably  
23 with other settlements in this district. For example, in *In Re Rubber Chemicals Antitrust Litig.*, No.  
24 C-04-1648 MJJ, Order, (N.D. Cal. Jan. 9, 2007) (a true and correct copy of which as attached  
25 hereto at Exhibit A), a similar horizontal price-fixing case in which some of the defendants had  
26 entered guilty pleas in related criminal proceedings, Judge Jenkins, in the course of granting  
27 preliminary approval, characterized a settlement payment of 4% of a defendant's sales as an  
28 "excellent recovery." *Id.* at 2; *see also, e.g., In re Plastic Tableware Antitrust Litig.*, 1995 U.S.

1 Dist. LEXIS 17014, at \*4 (E.D. Pa. Oct. 25, 1995) (3.5% of sales); *In re Linerboard Antitrust*  
 2 *Litig.*, 321 F. Supp. 2d 619, 627 (E.D. Pa. 2004) (1.62% of sales); *In re Shopping Carts Antitrust*  
 3 *Litig.*, 1983 U.S. Dist. LEXIS 11555, at \*24 (S.D.N.Y. Nov. 18, 1983) (5.5% of sales); *In re*  
 4 *Automotive Refinishing Paint Antitrust Litig.*, 2004 U.S. Dist. LEXIS 29161, at \*22 (E.D. Pa. Sept.  
 5 27, 2004) (recovery represented 2% of sales); *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F.  
 6 Supp. 446, 451 (E.D. Pa. 1985) (recovery represented 2.4% of sales); *Fisher Bros. v. Mueller Brass*  
 7 *Co.*, 630 F. Supp. 493, 499 (E.D. Pa. 1985) (recoveries equal to .1%, .2%, 2%, .3%, .65%, .88%,  
 8 and 2.4% of defendants' total sales).

9 The total recovery amounts to approximately 6.8% of Defendants' DRAM sales to direct  
 10 purchasers during the Class Period. This Settlement exceeds, as a percentage of sales, those  
 11 approved in most antitrust cases. The total Settlement amounts to approximately 40% of single  
 12 damages. This is an exceptional result. *See, e.g., Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS  
 13 13555, at \*62 (38% of sales deemed exceptional result); *In Re Medical X-Ray Film Antitrust Litig.*,  
 14 1998 U.S. Dist. LEXIS 14888, at \*15-16 (E.D.N.Y. Aug. 7, 1998) (increasing 25% benchmark to  
 15 33.3% where counsel recovered 17% of damages); *In Re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320,  
 16 326 (E.D.N.Y. 1993) (increasing benchmark to 33.8% where counsel received 10% of damages);  
 17 *In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d 484, 489-90, 498 (E.D. Pa. 2003) (permitting one-  
 18 third fee award from \$48 million settlement fund which represented approximately 15% of class'  
 19 total net damages).

#### 20 IV. RISKS OF THE LITIGATION

##### 21 A. Risk of Not Surviving Motions to Dismiss

22 34. The complaints filed and challenged in the Related Action were before the Supreme  
 23 Court's decisions in *Bell Atl. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct.  
 24 1937 (2009). The question of whether *Twombly* and *Iqbal* imposed a new pleading standard is still  
 25 being addressed by Ninth Circuit courts. Furthermore, defendants in recent antitrust cases have  
 26 challenged plaintiffs' standing to sue foreign defendants under the Foreign Trade Antitrust  
 27 Improvements Act, and the foreign Defendants here would have made this same argument.

1 **B. Risk of Not Achieving Class Certification**

2 35. In the Related Action, defendants argued that plaintiffs were not typical of other  
3 class members and that they could not represent the interests of many larger, corporate buyers that  
4 were in the Class. Defendants in the Related Action also challenged plaintiffs' experts, assailing  
5 the viability of their methodologies and contending that the complexity of the DRAM market and  
6 the diversity of DRAM products and prices made common proof of impact impossible. *See* Class  
7 Cert. Order, 2006 U.S. Dist. LEXIS 39841, at \*43 (N.D. Cal. June 5, 2006).

8 36. Defendants' expert in the Related Action bolstered defendants' arguments with a  
9 detailed and comprehensive rebuttal report. While Class Counsel succeeded in having the class  
10 certified, the Court's opinion left open the future question of whether the damages methodologies  
11 used by plaintiffs' experts would be allowed at trial. I expect that Defendants in this action would  
12 have raised the same arguments as they did in the earlier action.

13 **C. Risk of Not Surviving Summary Judgment**

14 37. In the Related Action, defendants filed five separate summary judgment motions.  
15 The issues raised by defendants were not easily disputed and required intense attention by Class  
16 Counsel and plaintiffs' experts. These challenges not only required legal analysis, but in many  
17 instances demanded fact-intensive responses that required Class Counsel to effectively marshal  
18 information from millions of pages of documents and deposition testimony. As in the Related  
19 Action, Class Counsel here would have had to contend with the Ninth Circuit's decision in *In Re*  
20 *Citric Acid Antitrust Litig.*, 191 F.3d 1090 (9th Cir. 1999), *cert. denied sub nom., Gangi Bros.*  
21 *Packing Co. v. Cargill, Inc.*, 529 U.S. 1037 (2000), which granted summary judgment to defendant  
22 Cargill, Inc. where there were similar facts and evidence to those which Plaintiff would have  
23 presented here.

24 38. In addition, in the Related Action, defendant Nanya filed two separate summary  
25 judgment motions, one on behalf of Nanya Taiwan (the foreign parent corporation that produced  
26 the DRAM at issue) and the other on behalf of Nanya USA (the American subsidiary which sold  
27 the DRAM at issue). After extensive briefing and oral argument, the Court granted summary  
28 judgment for Nanya Taiwan and dismissed it from the case, causing a serious risk for plaintiffs in

1 proving their case at trial because some of the key documents in the case regarding DRAM  
2 production and the alleged agreement between defendants were attributable to Nanya Taiwan's  
3 employees. Here, Defendants each have a foreign parent that produces DRAM and an American  
4 subsidiary that sells DRAM in the United States. The foreign parent Defendants here would have  
5 made the same argument as made by Nanya Taiwan in the Related Action, but with the added  
6 obstacle of the Court's decision in the earlier litigation. In sum, Class Counsel faced a great risk  
7 that Plaintiff's claims would be dismissed at summary judgment.

8 **D. Risk of Trial**

9 **1. The Risk of not Being Able to Establish Liability**

10 39. Price-fixing conspiracies are notoriously among the hardest cases to prove.

11 Conspiracies by their very nature are "secret," making direct and circumstantial evidence difficult  
12 to find. Ninth Circuit case law imposes an especially high burden of proof on Plaintiffs to establish  
13 a § 1 violation of the Sherman Act based on circumstantial evidence. *See Citric Acid Antitrust*  
14 *Litig.*, 191 F.3d at 1094 (explaining rigorous two-part test for circumstantial evidence).

15 40. The risk of trial in this case was particularly acute. While plaintiffs in the Related  
16 Action could rely on the DOJ's indictments and guilty pleas entered by defendants and their  
17 employees to support their case, Defendants Hitachi, Mitsubishi, and Toshiba were never indicted  
18 by the DOJ.

19 41. In addition, in the Related Action, numerous key witnesses from defendants refused  
20 to testify at deposition and invoked their Fifth Amendment right against self-incrimination.  
21 Several of those individuals were thought to be ringleaders of the conspiracy and faced individual  
22 indictments for their participation in the conspiracy. In the Related Action, the testimony of those  
23 individuals held the most promise for plaintiffs to uncover the important facts of the conspiracy  
24 and their silence created problems for plaintiffs to establish liability. Their refusal to testify made  
25 it nearly impossible to authenticate key documents, leaving plaintiffs with a lack of proof to be  
26 used at trial. Plaintiffs in the Related Action also faced the risk that the Court would instruct the  
27 jury that no adverse inferences could be taken from the Fifth Amendment depositions against  
28 defendants, making it even harder for plaintiffs in the Related Action to tell the conspiracy story to

1 a jury at trial. In the Related Action, there were also issues related to tracking down former  
2 employees and foreign nationals who refused to come to the United States and provide testimony.  
3 The same would only be compounded here by the passage of additional time.

4 42. For trial in this action, Class Counsel would have needed to show each Defendant's  
5 participation in the DRAM conspiracy. However, Class Counsel would have had to make their  
6 case against Defendants without the benefit of any indictments or guilty pleas and possibly without  
7 the testimony of key witnesses (and their documents). Class Counsel also faced the added risk that  
8 Defendants' employees might have invoked *their* privilege against self-incrimination, making  
9 liability even harder to prove. In sum, Class Counsel faced the significant risk not being able to  
10 establish each Defendant's participation in the overall conspiracy.

## 11 2. The Risk of not Being Able to Establish Damages

12 43. Perhaps the greatest risk facing Class Counsel was the fact they may not have been  
13 able to show that the Class suffered any damages during the Class Period. As defendants in the  
14 Related Action vigorously argued, between April 1, 1999, and June 30, 2002, *DRAM prices*  
15 *actually declined* and, therefore, there was no injury to plaintiffs during that period. Even worse,  
16 at times the decline appeared to be the result of intense price wars among Defendants and their Co-  
17 Conspirators in an attempt to force their financially struggling competitor, Hynix, out of the  
18 market. In the Related Action, defendants filed an entire summary judgment motion on this issue  
19 alone, arguing that due to this price decline, all sales within that specific period should be  
20 dismissed from the case. In the Related Action, defendants' motion for partial summary judgment  
21 on this point was denied, but the risk remained real as the case proceeded toward trial.

22 44. Moreover, several defendants in the Related Action pled guilty to charges brought  
23 against them by the DOJ only with respect to six, non-class member original equipment  
24 manufacturers ("OEMs") and not with respect to any other DRAM purchasers. Based on these  
25 guilty pleas, defendants in the Related Action consistently argued, both as to liability and damages,  
26 that the conspiracy had no connection to the Class as a whole. In the Related Action, Class  
27 Counsel had to contend with this argument at class certification, summary judgment, during  
28

1 settlement negotiations, and in preparing for trial. Defendants would have made the same  
2 challenges to damages here.

3 **E. Contingent Nature of the Fee**

4 45. As described above, Class Counsel faced a great risk of non-payment for their time  
5 and effort in litigating this case. As I have learned from many years of litigating similar class  
6 action lawsuits, the commencement of a class action is no guarantee of success. Class Counsel  
7 have received no compensation during the three year course of this litigation and have incurred  
8 \$1,711,853.75 in time and \$20,382.97 in expenses during the course of litigating this case. Despite  
9 the many risks faced, Class Counsel committed their financial and human resources to this  
10 litigation and achieved an outstanding result for the benefit of the Class. For this they should be  
11 fairly compensated and reimbursed.

12 **V. REIMBURSEMENT OF EXPENSES**

13 46. Class Counsel are seeking reimbursement for \$20,382.97 in expenses.<sup>7</sup> The time,  
14 personnel, and out-of-pocket expenses devoted to this case by Class Counsel were all reasonable  
15 and necessary to the prosecution of this action.

16 47. Class Counsel has reviewed this Court's standing order with respect to fee  
17 applications and reimbursement of costs for securities cases and has followed it here. No counsel  
18 is seeking for reimbursement of anything other than coach airfare or reasonable meals and  
19 accommodations in connection with the litigation of this case.

20 **VI. LODESTAR CROSS-CHECK CONFIRMS REASONABLENESS OF REQUESTED  
21 FEES AND EXPENSES**

22 48. Here, Class Counsel's lodestar was \$1,711,853.75 This amounts to a 5.44  
23 multiplier when compared against the 25% fee award requested. This 5.44 multiplier falls squarely  
24 within the range of multipliers deemed to be reasonable in this district and is comparable to the  
25 range of implied multipliers that have been found to be reasonable in other similar class actions.  
26 The reasonableness of this multiplier is further supported by the following factors:

27 <sup>7</sup> See the Declaration of Guido Saveri in Support of Motion for an Award of Attorneys' Fees and  
28 Reimbursement of Expenses and the Declaration of Fred Taylor Isquith in Support of Motion for  
an Award of Attorneys' Fees and Reimbursement of Expenses filed herewith; *infra* at VII.

1 **A. Experience of Counsel and Caliber of Opposing Counsel**

2 49. Here, the Class Counsel firms and attorneys specialize in representing plaintiff  
3 classes in antitrust actions. Class Counsel here are the same people that the Court found to be  
4 experienced and well-qualified in the Related Action. As the Court noted at the fee hearing in the  
5 Related Action:

6 The Court: ... you all have done an exceptionally good job in  
7 coordinating management and litigating this case. As I've said, I  
8 think you have been very respectful of my time. You have been very  
9 careful to not bring me a lot of unnecessary matters to deal with.

10 I know that wouldn't occur, because I've got cases that are a fraction  
11 of the size of this case that I spend a lot more time on just because  
12 counsel aren't acting as cooperatively and as professionally as you all  
13 have.

14 So I just wanted to take the opportunity to tell you that even though  
15 in a typical class approval, final approval motion I hear this, I read  
16 week after week this language about how well, how hard fought this  
17 litigation was, and able your adversary was and the kind of  
18 exceptional results you achieved, but this time I have to say that I  
19 think the language that appears in your motion is deserved. It's not  
20 just mere puffery. I think both [Class Counsel and defense counsel]  
21 have done an incredible job. And I just wanted to thank you all for  
22 your courtesy to the Court and to each other, which has been  
23 obvious.

24 *See* Transcript of Fee Hearing (Aug. 15, 2007) at pages 16-17.

25 50. One of the hallmarks of the underlying direct DRAM litigation was the ability of  
26 Class Counsel to resolve disputes and litigate the matter without unnecessary Court intervention.  
27 The same is true in this action. As a result of Class Counsels' experience, from the inception of  
28 this litigation in negotiating the terms of the tolling agreements to final approval of the settlements,  
29 Class Counsel has not burdened the Court with unnecessary motion practice.

30 51. Here, Class Counsel were opposed by attorneys from some of the largest firms in  
31 the country with near limitless resources at their disposal.<sup>8</sup> Despite facing such worthy adversaries,  
32 Class Counsel achieved an extraordinary result for the Class.

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<sup>8</sup> Hitachi is represented by McDermott Will & Emery LLP, Mitsubishi is represented by Jenner & Block LLP, and Toshiba is represented by Latham & Watkins.

1 **B. Difficulty of Issues**

2 52. The DRAM industry is particularly complicated. To effectively litigate this case  
3 against non-indicted Defendants, Class Counsel had to learn the intricacies of each Defendant and  
4 the details of their particular organization and DRAM products. The Defendants are multibillion  
5 dollar companies with countless employees spread throughout the world. Each has thousands of  
6 customers, large and small, and each with their own systems and procedures. Class Counsel had to  
7 learn each's record keeping systems, sales structure, marketing practices, cultural norms for  
8 Defendants' foreign operations, and the lingo used in the emails that were sent internally by  
9 Defendants as well the lingo used in communications with other Defendants and Co-Conspirators.

10 **C. Notice to Class Members and Class Member Response**

11 53. The absence of objections to the Settlement also demonstrates the fairness and  
12 reasonableness of Class Counsel's request for fees. Notices of the Settlement were mailed or  
13 emailed to more than one million Class Members, published in the *Wall Street Journal* and posted  
14 on the website established for this litigation. Class Members were informed in the settlement  
15 notice that Class Counsel would apply for attorneys' fees of up to 25% of the Settlement Fund and  
16 reimbursement of expenses and were advised of their right to object to such requests. In this case,  
17 out of more than one million notices sent, it is remarkable that no objections were received by the  
18 August 16, 2010 deadline.<sup>9</sup> The absence of objections is especially significant where, as here, the  
19 Class included many large, sophisticated business entities.

20 **D. Expected Hours for Claims Administration**

21 54. In the Related Action, Class Counsel spent approximately 2,000 hours administering  
22 the settlement funds and resolving class members' claims. Upon distribution of the settlement  
23 funds, Class Counsel *did not* request any additional fees for the enormous amount of time spent in  
24 resolving claims. As the Court is aware, many of the claims were very large and required many  
25 hours to resolve the issues involved, many of which were unique.

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<sup>9</sup> See footnote 5, *supra*, explaining *Mercury*.

1           55.     Class Counsel had to resolve many disputes that arose in verifying or approving  
2 legitimate claims. Among the many disputes were: (1) verification of large claims; (2) resolving  
3 disputes as to whether claimants had opted out or had settled their claims (many opt outs and  
4 claimants which had settled and which involved large claims filed claims); (3) claims that were  
5 barred by the FTLIA as being beyond the jurisdiction of the Court; (4) claims that were not  
6 supported by adequate documentation; (5) claims that did not involve any products in the action;  
7 (6) claims filed by different claimants for the same purchase, each claiming the right to the  
8 settlement funds; (7) claims that had been purportedly settled but claimed by other claimants; (8)  
9 foreign claims; and (9) disputes between claimants which had purportedly assigned their claims to  
10 other parties.

11           56.     Several of these disputes required motions and appearances before this Court and  
12 Class Counsel expended great effort to ultimately see these claims resolved. In particular, there  
13 was a heated dispute as to a \$4 million claim by class member Mega Comm. When Mega Comm  
14 went to file its claim, it was shocked to discover that one of its ex-employees, without any  
15 authorization from Mega Comm, had independently settled Mega Comm's claim with Micron for  
16 one dollar. Attorneys for Class Counsel spent many hours investigating and litigating this dispute.  
17 This was especially difficult given that counsel for Micron refused to provide any information on  
18 the details of the settlement and given that the ex-employee of Mega Comm was nowhere to be  
19 found. Attorneys for Class Counsel spent many hours researching and drafting motions on the  
20 novel issues presented by this dispute and ultimately litigated it to resolution through frequent  
21 discussions with Micron counsel and the claims administrator, motion practice, and oral argument.

22           57.     In spite of the many claims filed and the many disputes over the settlement funds in  
23 the Related Action, Class Counsel was able to resolve all disputed claims without a single appeal,  
24 which is unusual in a case of this size. Any appeal would have prevented the total settlement fund  
25 from being distributed until resolution of such appeal and may have required two distributions at a  
26 heavy cost to the Class.

27           58.     The purpose of discussing our administrative experience in the Related Action is to  
28 point out to the Court the problems and time Class Counsel anticipates in administering the

1 Settlement Fund here. To date there are already more than 8,000 claims filed by class members in  
2 this action. Class Counsel do not anticipate requesting any additional fees and costs for the work  
3 that will be required to administer the settlement other than the fees requested by this petition, but  
4 expect that a comparable amount of time and effort will be required to resolve the claims here as  
5 was required in the Related Action.

6 **VII. HAGENS BERMAN SOBOL SHAPIRO LLP TIME AND EXPENSES**

7 59. The schedule attached hereto as Exhibit B is a summary indicating the amount of  
8 time spent by the partners, attorneys and other professional support staff of my firm who were  
9 involved in this litigation, and the lodestar calculation based on my firm's current billing rates from  
10 inception of the case through September 10, 2010. For personnel who are no longer employed by  
11 my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her  
12 final year of employment by my firm. The schedule was prepared from contemporaneous, daily  
13 time records regularly prepared and maintained by my firm.

14 60. The hourly rates for the partners, attorneys and professional support staff included  
15 in Exhibit B are the same as the regular current rates charged for their services in non-contingent  
16 matters.

17 61. The total number of hours expended on this litigation by my firm from inception  
18 through September 10, 2010, is 1316.40 hours. The total lodestar for my firm is \$646,390.00.

19 62. My firm's lodestar figures are based upon the firm's billing rates, which rates do not  
20 include charges for expense items. Expense items are billed separately and such charges are not  
21 duplicated in my firm's billing rates.

22 63. As detailed in Exhibit C, my firm has incurred a total of \$7,904.20 in unreimbursed  
23 expenses in connection with the prosecution of this litigation.

24 64. The expenses incurred in this action are reflected on the books and records of my  
25 firm. These books and records are prepared from expense vouchers, check records and other  
26 source materials and represent an accurate recordation of the expenses incurred.

27 I declare under penalty of perjury under the laws of the United States of America that the  
28 foregoing is true and correct.

1 Executed this 21st day of September, 2010 at Seattle, Washington.

2 /s/ Anthony D. Shapiro  
3 Anthony D. Shapiro  
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# **Exhibit A**

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**FILED**  
JAN 09 2007  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
*E-filing*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IN RE RUBBER CHEMICALS ANTITRUST  
LITIGATION

MDL Docket No. C-04-1648 MJJ

Class Action

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS' MOTION FOR AWARD  
OF ATTORNEYS' FEES FROM THE  
CROMPTON SETTLEMENT AND  
REIMBURSEMENT OF EXPENSES**

THIS DOCUMENT RELATES TO:  
  
ALL ACTIONS.

Date: January 9, 2007  
Time: 9:30 a.m.  
Place: Courtroom of Hon. Martin J. Jenkins  
Courtroom 11, 19<sup>th</sup> Floor

Plaintiffs and defendants Crompton Corporation (now known as Chemtura Corporation) and Uniroyal Chemical Company, Inc. (now known as Chemtura USA Corporation) (collectively, "Crompton") entered into the Settlement Agreement With Crompton ("Settlement Agreement") to fully and finally resolve the Class' claims against Crompton and other Releasees. On October 25, 2006, the Court entered its Order Granting Preliminary Approval of Settlement with the Crompton Defendants ("Preliminary Approval Order"). Among other things, the Preliminary Approval Order authorized Plaintiffs to disseminate notice of the settlement, the fairness hearing, and related matters to the Class. Notice was provided to the Class pursuant to the Preliminary Approval Order.

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1 Plaintiffs' Motion For An Award Of Attorneys' Fees and Reimbursement of Expenses  
2 came on for hearing on January 9, 2007 after reasonable notice had been given to the Class in  
3 accordance with this Court's Preliminary Approval Order. Having considered the motion, the  
4 argument of counsel, and good cause appearing therefor, the Court hereby finds that:

5 1. The Court has jurisdiction over the subject matter of this litigation.

6 2. Terms capitalized in this Order have the same meanings as those used in the  
7 Settlement Agreement.

8 3. An award of attorneys' fees equal to twenty-five percent (25%) of the Crompton  
9 Settlement Fund is fair and reasonable. That amount shall be paid to Class Counsel from the  
10 Crompton Settlement Fund.

11 4. Class Counsel's unreimbursed expenses of \$39,208.35 were reasonably and  
12 necessarily incurred to prosecute this case. Class Counsel shall be reimbursed that amount from  
13 the Crompton Settlement Fund.

14 5. Class Counsel are hereby awarded interest on the attorneys' fees and expense  
15 reimbursement awarded above. Interest shall accrue from the date Crompton deposited the  
16 Settlement Fund into the Escrow Account until the date such funds are dispersed to Class  
17 Counsel. Interest thereon shall be paid at the same interest rate as earned by the Settlement Fund.

18 6. The foregoing award is based on the excellent recovery achieved for the benefit of  
19 the Class in a complicated matter and the fact that the award represents a reasonable percentage  
20 of the recovery obtained for the benefit of the Plaintiffs and the Class from Crompton. The  
21 settlement was attained following an extensive investigation of the facts. It resulted from  
22 vigorous arm's-length negotiations which were undertaken in good faith by counsel with  
23 significant experience litigating antitrust class actions.


24 7. Class Counsel, as designated by the Court (Gold Bennett Cera & Sidener LLP and  
25 Cohen, Milstein, Hausfeld & Toll, P.L.L.C.), shall allocate the attorneys' fees awarded herein  
26 among other counsel based on their assessment of the respective relative contributions by other  
27 counsel to the prosecution of the case on behalf of the Class.

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1           8.       Plaintiffs, Rubber Engineering and Development Company; Standard Rubber  
2 Products, Inc.; Polymeric, Inc.; Schlegel Corporation; Industrial Rubber Products LLC;  
3 Precision Associates, Inc.; and Monmouth Rubber & Plastics Corporation, shall each receive a  
4 payment of \$10,000 for their time and efforts on behalf of the Class. Plaintiffs shall each be paid  
5 that amount from the Crompton Settlement Fund.

6           **IT IS SO ORDERED.**

7  
8 Dated: 1/9, 2007

  
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JUDGE MARTIN I. JENKINS  
UNITED STATES DISTRICT JUDGE

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# **Exhibit B**

**DRAM-II ANTITRUST LITIGATION****TIME REPORT****FIRM NAME: Hagens Berman Sobol Shapiro****Inception - September 10, 2010**

[P] Partner  
 [A] Associate  
 [LC] Law Clerk  
 [PL] Paralegal  
 [L] Librarian  
 [OC] Of Counsel

Attorney or Paralegal	HOURS	HOURLY	LODESTAR
		RATE	
Laurie Cecil [PL]	80.70	150.00	12,105.00
Adrian Garcia [PL]	5.50	150.00	825.00
Robert Haegele [PL]	1.90	150.00	285.00
Jonathan Papac [PL]	10.10	150.00	1,515.00
Anthony Shapiro [P]	721.90	600.00	433,140.00
Ronnie Spiegel [A]	496.30	400.00	198,520.00
<b>TOTALS:</b>			\$646,390.00

# Exhibit C

Name: Hagens Berman Sobol Shapiro

**IN RE: DRAM II  
COSTS REPORT**

<b>CATEGORY</b>	<b>DESCRIPTION (if necessary)</b>	<b>Cumulative Costs</b>
UPS		\$59.30
Lexis/Nexis		\$128.79
Photocopies – in House		\$587.50
Telephone/telecopier		\$35.16
Travel		\$7093.45
<b>TOTAL</b>		<b>\$7904.20</b>